IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 3021 OF 1999

1) Smt. Indutai Dattatraya Salgaonkar)
2) Smt. Shashikala d/o Dattatraya)
Salgaonkar)
3) Govind Dattatraya Salgaonkar)
4) Jayant Dattatraya Salgaonkar)
All residing at Mukta Nivas,)
Municipal House No. 155 B, Navi)
Peth, Solapur) PETITIONERS

Versus

Siddheshwar Baslingappa Nimbalkar)
Siddheshwar Cloth Centre, 155 B,)
Navi Peth, Solapur) RESPONDENT

Mr. Rajesh Datar for petitioners
Mr. M.A. Utgikar for respondent

CORAM:-SMT. RANJANA DESAI, J.
DATED:- 30/8/2005

ORAL JUDGMENT:

. The petitioners plaintiffs are heirs of one

Dattatray Salgaonkar, who was the original landlord. The petitioners filed R.C.S. No. 288/1991 in the court of III Joint Civil Judge, Junior Division, Solapur for possession of the suit open site on the ground that the defendant tenant has without the landlord's consent given in writing erected on the suit premises permanent structure. In short the eviction was sought under Section 13(1)(b) of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947 ("The Rent Act" for short).

2. The case of the plaintiffs is that the deceased landlord had leased out suit open space to the defendant in the year 1975 on a rent of Rs.20/- per month. The defendant unauthorisedly without the consent of deceased Dattatraya Salgaonkar or plaintiffs and also without obtaining permission from the Municipal Corporation constructed a permanent structure on the suit open site and started a cloth shop thereon in the name and style of 'Siddheshwar Cloth Centre'. Deceased Dattatraya brought this fact to the notice of the municipal authority. According to the plaintiffs on account of unauthorised construction, the defendant is liable to be evicted and the plaintiffs are

entitled to recover possession of the suit premises. The plaintiffs served a notice on the defendant on 15/11/90 and terminated the tenancy of the defendant. However, the defendant objected to the said termination, hence the suit came to be filed.

3. The defendant resisted the suit. He contended that deceased Dattatray Salgaonkar, the original landlord had taken Rs.5,000/- from him and constructed a temporary shop on the suit open space. The said shop was leased out to the defendant in the year 1975 for the purpose of conducting a cloth shop. The defendant is running a cloth shop since 1975. The defendant has a valid Shop Act licence. The defendant also has electric connection which was obtained with the permission of deceased Dattatray Salgaonkar. Thus it is the case of the defendant that he had taken the constructed shop from the original landlord Dattatray Salgaonkar on rental basis. According to the defendant the original tenant had told the defendant that as the construction is of a temporary shed, permission from the corporation was not necessary. In the alternative the defendant contended that assuming that the defendant had

constructed a shop the said construction cannot be described as construction of permanent nature. According to the defendant the plaintiff had knowledge about this construction in 1975 but the plaintiffs never objected to it and, therefore, the plaintiffs have waived their right to recover possession.

4. On these rival pleadings the trial court framed issues. The parties led evidence and upon consideration of the evidence and the documents produced by the parties the trial court held that the plaintiffs have failed to prove that the suit open space was leased out to the defendant. The trial court further held that the plaintiffs had failed to prove that the defendant has erected permanent structure on the suit open space without consent of the landlord. The trial court thus dismissed the suit.

5. Being aggrieved by the said judgment and order the plaintiffs carried an appeal to the court of IV Additional District Judge, Solapur being Regular Civil Appeal No. 301/94. By his judgment and order dated 30/9/98 the lower appellate court confirmed the findings of the trial court and

dismissed the appeal and hence this writ petition.

6. I have heard at considerable length the learned counsel appearing for the parties.

7. Mr. Datar, the learned counsel for the petitioners contended that the findings recorded by the courts below are inconsistent with each other. He submitted that the courts below have held that there is evidence to show that only open site was let out to the defendant but inference is drawn that constructed structure of shop might have been let out to the defendant. The learned counsel further pointed out that the courts below have held that the municipal authority had issued notice as regards unauthorised construction to both, the plaintiffs and the defendant and in the criminal case admittedly both have pleaded guilty and, therefore, it must be held that the shop structure was constructed with the knowledge of the plaintiffs. The learned counsel pointed out that the courts below have further held that since the plaintiffs who had full knowledge about the unauthorised nature of the construction did not object to it, the plaintiffs have waived their right to seek possession of the suit premises on

the ground of unauthorised permanent construction. The learned counsel urged that this is a wrong approach because since the construction is unauthorised and prohibited in law there can be no

waiver of right to recover the possession.

8. In this connection the learned counsel relied on Dulichand (dead) by LRs. v. Jagmender Dass, (1990) 1 S C C 169. He pointed out that while dealing with the question of waiver by landlord in a case of subletting the Supreme Court considered Section 14 1 (b) of Delhi Rent Control Act, 1958 where the words used are "without obtaining the consent in writing of the landlord". The Supreme Court held that in view of this it was necessary for the tenant to obtain the consent in writing to sublet the premises. The Supreme Court further observed that mere permission or acquiescence will not do. The consent shall also be to the specific subletting or parting with possession and the requirement of consent to be in writing was to serve a public purpose i.e. to avoid dispute as to whether there was consent or not and therefore, mere permission or acquiescence will not do. While

noting that everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity, in the context of the statutory provision of the Delhi Rent Control Act, the requirement as to the consent being in writing was in the public interest and that, therefore, there cannot be any question of waiver of a right, dealing with the rights of the tenants or landlord. The learned counsel contended that these observations of the Supreme Court are squarely attracted to the facts on hand and the courts below were not right in holding that the plaintiffs have waived their right to recover possession. The learned counsel contended that the impugned judgment and order is, therefore, perverse and warrants interference of this court in its writ jurisdiction.

9. On the other hand the learned counsel for the respondent contended that the power of superintendence of this court under Article 227 of the Constitution of India being extraordinary, the said power has to be exercised sparingly and only in appropriate cases. In the instant case both the courts have properly considered every aspect of the

matter and have delivered well reasoned judgments. This court should not therefore, interfere with them.

10. The learned counsel also drew my attention to the plaint filed by the plaintiffs. He pointed out paragraph 3 of the plaint and contended that the suit premises have not been properly described. The learned counsel urged that for seeking eviction under Section 13(1)(b) of the Rent Act, the landlord has to plead material facts and place material particulars before the court so as to establish the nature of construction and as in the instant case the plaintiffs having failed to do so they are not entitled to any relief. In this connection he relied on judgment of this court in Hotel Rosalia Pvt. Ltd. v. M/s. Metro Hotels & Ors., 2001 (2) MLJ 881.

11. Since both the courts have returned concurrent findings of facts against the plaintiffs it is necessary to see what is the scope of powers of this court when it is exercising it jurisdiction under Article 227 of the Constitution of India. In Waryam Singh v. Amarnath AIR 1954 SC 215, the Constitution Bench held that the power of

superintendence conferred by Article 227 should be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. In Rena Drego (Mrs.) v. Lalchand Soni & Ors. (1998) 3 S C C 341, the Supreme Court was dealing with a case where the learned Single Judge of the High Court had reversed the decree of eviction which was based on findings of facts arrived at by the fact-finding authority upon the evidence on record. The Supreme Court disapproved the High Court's interference with the findings of facts. The Supreme Court referred to Waryam's case and held that it is now wellnigh settled that power under Article 227 is one of judicial superintendence which cannot be used to upset conclusions of facts, however, erroneous those may be, unless such conclusions are so perverse or so unreasonable that no courts could ever have reached them. It is, therefore, necessary to see whether findings of facts recorded by the courts below are perverse.

12. The case of the plaintiffs is that open site was leased out to the defendant. The plaintiffs have produced rent receipt book Exh. 47 where the

description of the suit site is given as open site. But it is pertinent to note that Exh. 53 which is the rent receipt produced by the defendant does not indicate that open site was leased out to the defendant. The words 'open site' are absent in the rent receipt Exh. 53. While Exh. 47 has come from the custody of the plaintiff landlord, Exh. 53 has come from the custody of the defendant tenant. It's issuance is not denied by the plaintiffs. The fact that the words 'open site' are absent in this receipt is significant. The case of the defendant that the description of the premises as open site is mentioned by the plaintiffs afterwards to create evidence appears to be correct. Exh. 47 has rightly not been relied upon by the courts below.

13. The defendant has produced revision forms at Exh. 54. Mr. Datar pointed out that the trial court has observed that after verifying the original revision forms it appears that the courtyard is let out to the defendant for the purpose of cloth shop. The submission of Mr. Datar is correct. But the trial court has also observed that it is clearly mentioned in the revision forms that verandah is let out to the

defendants for carrying out the business of cloth shop. This lends support to the defendant's case that the landlord let out constructed shop to the defendant for his cloth shop.

14. After evaluating the evidence both the courts have held that since 1975 till today the defendant is doing his business in the shop which is situated on the suit open space. Rent receipts are issued in favour of the defendant from 1975 till 1983. The defendant has obtained Shop Act Licence in 1975 which is at Exh. 48. The plaintiff has at one stage stated that his father had let out open site to the defendant but at some other place he has stated that the defendant has cheated his father with intention to grab his residential building. He is not consistent. His version is not found to be reliable by the court below and I have no reason to take another view of the matter.

15. Besides admittedly the corporation had filed a criminal case in respect of the unauthorised construction against the plaintiffs father and the defendant. Both have pleaded guilty and deposited the fine amount. This is consistent with the defendants case that the plaintiff had constructed

a temporary shop on the suit open space and let it out to the defendant in the year 1975 for the purpose of carrying on cloth business. Whether the alleged construction is legal or illegal is not in issue. That aspect has already been considered by the criminal court. Here the question is whether the defendant has constructed shop premises without the consent in writing of the plaintiff landlord. It appears to me that in fact it is the plaintiffs who have constructed the shop or allowed the defendant to construct the shop and let it out to him. The plaintiffs issued rent receipts to him from 1975 to 1984. This explains why plaintiff's father pleaded guilty in the criminal court. Reliance placed by Mr. Datar on Dhulichand's case is totally misplaced. In this case the landlord has let out the constructed premises to the tenant. Therefore, there is no question of the defendant-tenant taking any written permission from the plaintiff-landlord. The facts of the present case materially differ from the facts which were before the Supreme Court in Dhulichand's case.

16. In my opinion reliance placed by the trial court on Ramchandra Dattatraya Gandhi (Tenant) v. Pushpabai Manohar Sheth (Landlord) 1990 MLJ 485 is

apt. In that case the tenant had made construction without any objection by the landlord. The landlord filed a suit under Section 13(1)(b) of the Rent Act. This court held that what Section 13(i)(b) of the Rent Act says is that if the permanent structure is to be put up without the consent of the landlord that gives right to the landlord to file a suit as against the tenant. It is open to the landlord to avail of the right or not to avail of it. He can always waive that right. The court further observed that the conduct of the landlord in the present case was so clear that at no point of time he ever objected to the construction. There was evidence to show that it was all done with the knowledge of the previous owner and in such a case it was not open to the landlord after several years to turn round and file a suit under Section 13(1)(b) of the Rent Act. In my opinion, facts of this case can be compared with the facts which were before this court in Ramchandra's case.

16. In view of the above, in my opinion, no case is made out for interference with the concurrent findings of facts of the courts below. Petition is rejected. Rule is discharged.

(SMT. RANJANA DESAI,J.)